Supreme Court, U.S.
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No. 01-304

IN THE

# Supreme Court of the United States

TITAN INTERNATIONAL, INC., DICO INC., and TITAN WHEEL CORPORATION OF WISCONSIN,

*Petitioners,*

*v.*

DUANE BEVER,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## REPLY BRIEF

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## STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statements were set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to those statements.

## I. SUMMARY OF REPLY ARGUMENT

The fundamental issue raised by this case is whether a claimant under the Americans with Disabilities Act ("ADA") can be a "qualified individual with a disability" for the purposes of a discrimination claim based on the theory of failure to accommodate while not being a "qualified individual with a disability" for a discrimination claim based on the theory of disparate treatment when both claims arise out of a single adverse employment action, such as termination.

The analysis of an accommodation claim must focus on an "employment position." The rationale suggested by the Seventh Circuit's decision starts with an employee's subjective perception of the permanency of his work assignment. Under such an analysis, any employee can simply claim that he was a "qualified individual" for the set of tasks to which he was voluntarily assigned; thus, the employee may avoid the identification of an employment position. The rationale advanced by the court below was that after some undefined period of time, an assignment, even if such assignment eliminates essential functions, is transformed into a position.[1] The analysis ignores the ADA's requirement that accommodation must be reasonable, and long-established authority holding that accommodations that implicate essential functions are not required by the ADA.

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1. This rationale is certainly a new pronouncement of the law and it renders the words "essential functions of the employment position such individual holds or desires" in 42 U.S.C. § 12111(8) unnecessary for any claimant whose employer voluntarily assigns him to less than all the essential functions of his position. This new rule of law is in conflict with *Phelps v. Optima Health, Inc.*, 251 F.3d 21 (1st Cir. 2001), *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999), and *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997), as well as published opinions within the Seventh Circuit, for example, *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 701 (7th Cir. 1998) (rejecting as "unreasonable" plaintiff's argument that employer, who had assigned plaintiff to light-duty tasks, should "separate the automatic lift operator task out of the multi-duty inserting packager position" in order to accommodate plaintiff).

## II. CONTRARY TO RESPONDENT'S CONTENTION, THE SEVENTH CIRCUIT DID NOT APPLY THE SAME STANDARDS AS THE COURTS IN THE FIRST, SIXTH AND ELEVENTH CIRCUIT CASES BECAUSE IT APPLIED A TEMPORARY VERSUS PERMANENT ANALYSIS TO MR. BEVER'S *ASSIGNMENT* RATHER THAN TO HIS EMPLOYMENT POSITION

The Seventh Circuit did not utilize a "fact-intensive inquiry as to whether the assignment [to the Denison] was permanent or temporary," as Respondent contends. Opp. 11. Instead, the court completely ignored the ADA requirement that it analyze the "essential functions of the employment position." 42 U.S.C. § 12111(8).

The trial court held that Bever was an assembler, a position that consisted of two essential functions, the tire mount/inflate function and the Denison function. App. 19a. The District Court found, and the Seventh Circuit adopted, the conclusion that Titan's termination of Bever did not violate the ADA because that Bever was not a qualified individual with a disability since he could not perform the essential functions of the assembler position with or without accommodation. App. 25a; App. 2a. A court should not separate an employment position composed of two essential functions into two separate positions, especially when the definition of the employment position is undisputed. Nevertheless, the Seventh Circuit concluded that "we think that whether this assignment was temporary or permanent was unclear to him, and he can claim he was a qualified individual for the job he held," App. 6a, ignoring the prior factual determination that Bever held the assembler position.

To support a failure to accommodate claim, an employee may assert that the position he "holds" can be restructured or that he can be reassigned to a different, vacant position that he "desires." 42 U.S.C. § 12111(9)(b); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1162 (10th Cir. 1999) (collecting cases demonstrating that numerous circuits have interpreted a "qualified individual with a disability" as including individuals "who can perform an appropriate reassignment job within the company, with or without

accommodation, even though they cannot perform their existing job no matter how much accommodation is extended[.]")

The proper analysis of an accommodation claim begins with the identification of the specific position held by the employee and the fact that he desires another position within the company or seeks to restructure his position. The Seventh Circuit decision announced, or at least, suggested, without explanation, a subjective temporal test to determine whether an *assignment* has evolved into a position. This approach, unlike the First, Sixth and Eleventh Circuits' decisions, permits the disabled employee to "hold" two different positions for purposes of discrimination claims under the ADA even though he was terminated from only one.

An employee's assignment to less than all the essential functions of his position is inherently not a reassignment to a position. Since the "job," in this case, was a set of tasks constituting less than all of the essential functions of Respondent's position, Respondent's perception regarding the duration of his assignment changes nothing. He could not perform the essential functions of his position, and no other vacant *position* for which he could perform the essential functions existed. Under these circumstances, as in *Phelps, Bratten* and *Holbrook*, the analysis of the accommodation claim must be co-extensive with the analysis of the termination claim. In short, the claims merge. Under these circumstances, the ADA precludes a claimant from proceeding on a failure to accommodate claim based on a termination from employment where the termination decision itself has been upheld. The rule announced by the Seventh Circuit in an unpublished opinion[2] directly conflicts with the ADA and a dramatic departure from the interpretation in several circuits.

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2. Titan has acknowledged in its Petition that the Seventh Circuit decision is unpublished, which means that under the Seventh Circuit rules it may not be cited or used as precedent. The publication of the decision is not the issue for which Titan seeks review. Nevertheless, the Seventh Circuit's departure from significant authority by embedding legal standards and analysis in an unpublished decision may implicate (Cont'd)

## III. THE SEVENTH CIRCUIT'S RATIONALE, IN EFFECT, CREATES A PRESUMPTION OF LIABILITY FOR EMPLOYERS WHO GO BEYOND WHAT THE ADA REQUIRES IN ACCOMMODATING DISABLED EMPLOYEES

The presence of the term "desires" modifying "employment position" in the ADA does not require the courts to analyze an employee's failure to accommodate claim from the employee's perspective of the "new assignment." The question whether an employee is a qualified individual from that perspective would be self-fulfilling because an employer has nothing more to accommodate – the voluntary "assignment" transformed into a desired position will always be one for which the disabled employee is qualified. For accommodation claims, the relevant functions for purposes of analysis are those of the position for which the employee was hired, as opposed to the job to which he is assigned. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1175-76 (10th Cir. 1999) (affirming district court's analysis of termination claim utilizing essential functions of position for which plaintiff was hired, not the "position" to which she was assigned at time of termination). Unless an ADA claimant is transferred from the *position* for which he was hired to a new *position,* that individual must "hold" the position for which he was hired; moreover, he may only "desire" another existing, vacant position. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*); 42 U.S.C. § 12111(9).

The Seventh Circuit's use of a duration standard to transform a "job" into a "position" fails to provide any guidance on the question of whether and when discontinuing a voluntary assignment is

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(Cont'd)
constitutional concerns which are the subject of conflict between the federal circuits. *Compare Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*), and *Hart v. Massanari*, __ F.3d __, 2001 WL 1111647 (9th Cir. 2001). In any event, the issue in this matter remains of significant import to employers governed by the ADA.

discriminatory. The Seventh Circuit's rationale fails to define how long an employer may assign an employee to less than all the essential functions of his position without risking the creation of a new position. In contrast, even where the assignment duration exceeds that involved here, other federal circuits that have considered this issue have uniformly upheld an employee's decision to cease such an assignment, because it exceeds the requirements of the ADA. *See, e.g., Holbrook.*

In every case where an employer voluntarily assigns a disabled employee to a set of tasks constituting less than all the essential functions of his employment position, the employer risks exposure to liability, such as that experienced by Petitioner in this case. If the disabled employee suffers an adverse employment action, the employee may claim that he was qualified for the "position" consisting solely of the tasks to which he had been assigned. In effect, this rationale creates a presumption that the employer has violated the ADA even where the ADA would not require the voluntary assignment in the first place. Paradoxically, employers face greater exposure to ADA liability where they do more than the Act requires.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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